**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **CHRIS T. HARRELSON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 216,844 |
| **FIRST DATA RESOURCES, INC.** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **TRAVELERS INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appeals from the preliminary hearing Order of Administrative Law Judge Alvin E. Witwer dated January 28, 1997, wherein Judge Witwer denied claimant benefits finding claimant had failed to provide the necessary notice under K.S.A. 44-520.

## ISSUES

Whether claimant provided notice in a timely fashion pursuant to K.S.A. 44-520.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for purpose of preliminary hearing, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was a data entry worker for respondent in its credit card division. Claimant was employed by respondent for 14 months with his last date of employment being December 8, 1995. Respondent had bought out Mobile Oil Company's credit card division approximately 14 months before claimant's last date of employment. Claimant did work for Mobile Oil in the same capacity for several years prior to the buy out.

Claimant testified to having symptomatology in his hands including numbness, tingling, and night awakening for the entire 14-month period he worked for respondent. During employment with respondent, claimant at no time advised any of his supervisors or any representative of respondent of his ongoing symptomatology.

When respondent closed its operation in December 1995, transferring the credit operation to Tulsa, Oklahoma, claimant terminated his employment and accepted severance pay through respondent's buy out program.

Claimant's symptoms continued through the spring and summer of 1996. Claimant began seeking medical treatment and in July 1996 was diagnosed with bilateral carpal tunnel syndrome. The medical records of Nicholas Szilagye, M.D., dated July 19, 1996, indicate probable carpal tunnel syndrome bilaterally and recommend EMG and nerve conduction studies. The existence of the carpal tunnel syndrome was confirmed by EMG on August 19, 1996. Claimant's examination with Stephen L. Reintjes, M.D., dated September 25, 1996, again confirmed the existence of carpal tunnel syndrome. Dr. Reintjes opined that claimant's carpal tunnel syndrome arose out of and in the course of his employment with respondent.

Claimant acknowledges the first notice provided to respondent was September 27, 1996, at which time his attorney faxed a Kansas notice form K-WC15 alleging accidental injury arising out of and in the course of his employment with respondent. The issue is whether claimant was obligated to provide notice prior to being told by Dr. Reintjes that his bilateral carpal tunnel condition was related to his employment with respondent.

K.S.A. 44-520 states:

> "Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable

> to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

Claimant alleges his failure to provide notice to respondent was justified due to his being uninformed regarding the connection between his carpal tunnel syndrome and his employment. In support of his position claimant cites several cases in his brief to the Appeals Board. Claimant first cites Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994). Claimant alleges that in Berry the Court of Appeals allowed a claimant benefits even though notice of claimant's accident did not occur until several months after claimant left employment with respondent. This is a misstatement of the facts in Berry. In Berry claimant was diagnosed with carpal tunnel syndrome in the left extremity in June 1987. Claimant terminated his employment with respondent in August 1987 and was diagnosed with bilateral carpal tunnel syndrome in October 1987. The issue in Berry was not whether claimant had carpal tunnel syndrome but whether it was bilateral or to a single extremity. The respondent had knowledge that claimant suffered carpal tunnel syndrome several months prior to his termination of employment.

In this case respondent had no knowledge that claimant was experiencing symptomatology until some nine months after the employment relationship had terminated. Even though claimant experienced symptoms at work including numbness, tingling, and pain, claimant failed to inform his supervisor or any representative of respondent of his symptoms for the entire 14-month period he was employed by respondent.

Claimant also cites Angleton v. Starkan, Inc., 250 Kan. App. 2d 711, 828 P.2d 933 (1992), in support of his position that strictly construing applicable time limits would defeat the purpose of the Workers Compensation Act. The facts in Angleton are significantly different from those in this case. In Angleton claimant was murdered as he was smoking marijuana with another truck driver in February 1984. The intent and purpose of the murder was to separate the deceased claimant from his load. Claimant's body was not discovered until March 1987 some three years later. One of the issues presented to the Court of Appeals was whether K.S.A. 44-520a, the written claim statute, should be allowed to run or should be tolled. In Angleton the Appeals Court found that "where death occurs to an employee arising out of and in the course of employment, but the fact of death is not ascertained or reasonably ascertainable until a date later than the actual date of death, the limitations of K.S.A. 44-520a(a) do not apply until the death of the employee is ascertained or is reasonably ascertainable."

In this instance the fact that claimant was suffering symptomatology was not only ascertainable, it was clearly ascertained, by claimant for a 14-month period. The fact that claimant did not have a specific diagnostic label to place on the ongoing symptomatology is irrelevant. Claimant clearly was aware that he was suffering some type of problem at work and, for reasons known only to claimant, elected to withhold this information from respondent for the entire 14-month period of his employment.

The Appeals Board finds no justification in claimant's argument that the limitations of K.S.A. 44-520 should be extended until claimant is provided a specific diagnosis of his symptoms and advised that the symptoms which he experienced on a daily basis at his employment were, in the opinion of a medical provider, work related. Therefore, the Appeals Board finds that the Order of Administrative Law Judge Alvin E. Witwer denying claimant benefits for his failure to provide notice under K.S.A. 44-520 should be, and is hereby, affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Alvin E. Witwer dated January 28, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this ____ day of March 1997.

BOARD MEMBER

c: Gary D. Rappard, Kansas City, MO
Kenneth J. Hursh, Overland Park, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director